IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62631-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
RICHARD HODGES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 1, 2010
	)	

Ellington, J. — Richard Hodges was convicted after a jury trial of one count of violation of the uniform controlled substances act, possession of cocaine, and one count of second degree theft. He appeals on several grounds, namely sufficiency of the evidence to support the theft conviction, the trial court's decision not to order a competency hearing, and calculation of his offender score. We affirm.

BACKGROUND

On the evening of September 17, 2005, Elhaadji Mbacke, the manager of a Safeway store in Seattle, observed Hodges push a shopping cart filled with meat and groceries out of the store without paying for the items. Mbacke followed Hodges into the store's parking lot and asked Hodges if he planned to pay for the items in the cart. Hodges replied that he had no money. Mbacke took Hodges back inside the store to a room upstairs. Mbacke took photographs of the shopping cart filled with meat and

groceries and called the police.

Mbacke scanned each item in Hodges' shopping cart and produced a receipt itemizing the contents of the cart. The total amount on the receipt was $310.12, including tax.

Officer Karl Anderson responded to the shoplifting call. Officer Anderson arrested Hodges for theft, searched him incident to the arrest, and found what he believed to be crack cocaine on Hodges' person. The Washington State Patrol (WSP) Crime Laboratory confirmed that the substance Officer Anderson found on Hodges' person was cocaine.

Hodges was charged with one count of possession of cocaine and one count of theft in the second degree. Trial was continued several times,on motion of defense counsel,because of concerns about Hodges' mental health. On August 16, 2006, the trial court ordered an out-of-custody pretrial competency examination at Western State Hospital (WSH). That examination was never completed, but on May 1, 2007, when Hodges was in jail on new charges, the court ordered an in-custody examination of him at WSH.

In a forensic psychological evaluation dated May 29, 2007, prepared after the in-custody evaluation, Dr. Gregg Gagliardi, a licensed psychologist at WSH, determined that Hodges could likely suffer from chronic paranoid schizophrenia with antisocial personality traits and malingering, which made it difficult for an evaluator to assess his mental condition on any particular occasion. Dr. Gagliardi explained that the most likely explanation for the divergence in Hodges' past diagnoses was his "markedly

fluctuating mental condition, quite possibly attributable to substance abuse, psychosocial stresses and his demonstrated tendency to exaggerate or fabricate his symptoms to achieve some personal objective."[1] Dr. Gagliardi concluded that Hodges was not suffering from acute symptoms of a major mental disorder at that time.

On June 7, 2007, the trial court found Hodges competent to stand trial and entered findings of fact and conclusions of law to that effect.

Trial was set to begin on July 16, 2007. On that date, defense counsel again raised concerns about Hodges' mental health, stating that when she visited Hodges in jail, he was talking to persons who were not there. Defense counsel asked the trial court to engage in a colloquy with Hodges to assess his competency. The trial court asked Hodges a lengthy series of questions. Hodges' responses to the court's questions were of varying degrees of clarity and responsiveness.[2] The trial court also reviewed Dr. Gagliardi's May 29 evaluation. The trial court concluded that there was no basis for sending Hodges back to WSH for another evaluation.

A jury was selected, and counsel gave their opening statements. At the end of defense counsel's statement, Hodges stood up, took a bottle off the table, and began to urinate in the bottle. The trial court ordered the jury removed and directed Hodges to complete his urination in a trash can. Hodges stated that his medication caused his

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[1] Clerk's Papers at 98.

[2] For example, the court asked whether Hodges remembered anything about the incident at Safeway. Hodges responded: "They got killed and I had nothing to do with it." Report of Proceedings (RP) (July 16, 2007) at 9. The court asked: "I've got a black robe on. Do you know what my job is here, what I'm supposed to do?" Id. at 12. Hodges responded: "On Perry Mason, they go bang, bang." Id. The court asked: "Are you in jail?" Id. at 14. Hodges responded: "Yeah. Well, I'm like a trustee kind of guy." Id.

frequent and urgent need to urinate. He was then removed from the courtroom. Defense counsel moved for a mistrial. Giving Hodges "the benefit of the doubt,"[3] the trial court granted the mistrial.

A new trial commenced two days later. Mbacke, Officer Anderson, and a WSP forensic scientist testified. Hodges decided not to testify. The State sought to admit the Safeway receipt at trial as evidence of the value of the goods involved in the second degree theft charge. Defense counsel objected on the ground that the State failed to lay a proper foundation. The trial court overruled the objection and admitted the receipt.

A jury convicted Hodges of both possession of cocaine and second degree theft.

Before Hodges was sentenced, defense counsel asked permission to withdraw from the case because Hodges had requested her removal from his two other pending cases. In September 2007, Hodges signed a waiver of speedy sentencing, and new defense counsel continued sentencing so Hodges could be further evaluated. In December 2007, sentencing was again continued because Hodges was being evaluated at WSH.

In a report dated December 7, 2007 and prepared after the evaluation, Dr. Gagliardi concluded that Hodges met the criteria for civil commitment under RCW 71.05 as gravely disabled and recommended a full neuropsychological evaluation. Hodges underwent a neuropsychology examination at WSH. Dr. Christopher Graver, who conducted the evaluation, stated that, with Hodges' impending

[3] RP (July 17, 2007) at 22.

legal proceedings, "the possibility of secondary gain and malingering must be considered, as has been suggested in previous evaluations, as the most salient factor."[4]

Based on Dr. Graver's evaluation, Dr. Gagliardi concluded, in a report dated January 25, 2008, that Hodges exaggerated or feigned symptoms of a mental disorder and that the neurological examiner's findings of malingering were consistent with his own similar findings. Dr. Gagliardi found, on a more probable that not basis, that Hodges was not suffering from an organic mental disorder and that he possessed the capacity to understand the proceedings against him and to assist defense counsel.

On January 30, 2008, defense counsel asked for, and the court granted, a continuance to allow the defense to do its own evaluation of Hodges' competency to participate in his sentencing. In May 2008, the defense presented an evaluation conducted by an outside physician who concluded that Hodges had decompensated since his last evaluation. By order dated June 17, 2008, the court ordered that Hodges be evaluated at WSH. In a June 24, 2008, report of the evaluation, Dr. Gagliardi found it unclear whether Hodges' mental condition had truly deteriorated. However, "[i]n the interest of erring on the side of caution,"[5] he recommended that the court order Hodges to undergo further inpatient treatment. The following day, the court ordered Hodges to stay another 90 days at WSH for further evaluation of his competency. WSH issued a report dated July 21, 2008 finding Hodges competent. The court found Hodges competent by order dated September 25, 2008, and entered a judgment and sentence

[4] Clerk's Papers at 134.

[5] Clerk's Papers at 140.

on October 2, 2008.

DISCUSSION

Sufficiency of the Evidence

Hodges argues that the evidence was insufficient to sustain his conviction of second degree theft, specifically on the issue of the value of the items stolen. He argues that the only evidence of value was the receipt that Mbake generated and that the trial court erred by admitting the receipt because the State failed to lay a proper foundation for its admission.

When reviewing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6] The decision to admit or exclude evidence is within the discretion of the trial court, and we will not reverse that decision absent a manifest abuse of discretion.[7] This includes the decision to admit business records.[8]

Our decisions in State v. Rainwater[9] and State v. Quincy[10] are instructive. In Rainwater, a security guard at a Lamonts store recovered stolen clothing from a group of women who attempted to flee in their car. The security guard was the only State's witness who testified about the value of the merchandise. The guard testified that, after the women were taken into custody, he brought the stolen clothing into a back room of

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[6] State v. Chang, 147 Wn. App. 490, 498, 195 P.3d 1008 (2008), review denied, 166 Wn. 2d 1002 (2009).

[7] State v. Iverson, 126 Wn. App. 329, 336, 108 P.3d 799 (2005).

[8] State v. Garrett, 76 Wn. App. 719, 722, 887 P.2d 488 (1995).

[9] 75 Wn. App. 256, 876 P.2d 979 (1994).

[10] 122 Wn. App. 395, 95 P.3d 353 (2004).

the store for itemization. Following normal store procedure, the guard, with the help of store management staff, compiled an itemized list of the clothing. The value of the merchandise was determined based on the price tags attached to the stolen garments.

The defendant argued that the trial court erred by admitting the itemized list into evidence because it was hearsay. We rejected that argument and held that the list was admissible as a business record under RCW 5.45.020, which provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The security guard's testimony in Rainwater established that the itemized list was a record prepared in the normal course of business following the store's recovery of stolen merchandise and that the security guard followed normal store procedure in the preparation of the list at or near the time of the theft. Accordingly, the list was admissible as a business record.

The defendant also argued that the trial court erred by admitting the price tags on the clothing as evidence of the value of the stolen goods because, under State v. Coleman,[11] the tags, when not accompanied by foundational evidence, were not admissible as evidence of value under the business records exception to the hearsay rule.[12] We declined to follow Coleman in light of current technology and retail practices.[13] Accordingly, although the State failed to offer the foundational evidence

[11] 19 Wn. App. 549, 576 P.2d 925 (1978).

[12] Rainwater, 75 Wn. App. at 260.

[13] Id. at 261.

required by RCW 5.45.020 because the security guard was not qualified to testify as to the store's pricing procedures, we held that the price listed on a price tag is an accurate reflection of the items' market value.[14] Indeed, a price tag may be the best available evidence of the market value of the kind of retail merchandise which is typically sold for the price shown on such tags. We concluded that a trial court "can properly take judicial notice of the fact that price tags on retail clothing generally reflect the market value of the clothing, since this fact is both commonly known and capable of ready demonstration."[15] We cautioned, however, that such price tags constitute substantial evidence of market value only so long as the store involved is commonly known to sell its goods for a nonnegotiable price as shown on the tag.

In Quincy, we expressly extended our holding in Rainwater to electronic price scans of the universal product code (UPC).[16] In Quincy, Fred Meyer loss prevention officers scanned the UPC label from each item found in the defendant's possession, and the store computer generated a list and total value of the stolen merchandise. The defendant argued that the trial court erred by admitting, under the business records exception to the hearsay rule, the computer-generated list of the items he took from the store. Because Fred Meyer was a retail store commonly known to sell its goods for a nonnegotiable price as established by scanning the UPC code, we held that the computer-generated prices constituted business records.

Under Rainwater and Quincy, the trial court here did not abuse its discretion in

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[14] Id.

[15] Id.

[16] Quincy, 122 Wn. App. at 401.

admitting the receipt as evidence of the value of the goods Hodges stole from the Safeway store. There is no dispute that the store manager, Mbacke, was the custodian of the receipt. He testified that he scanned the UPC label on each item found in Hodges' grocery cart on an electronic scanner after he brought Hodges back into the store and before he called the police. Mbacke testified that doing so was the standard practice when a suspected shoplifter is detained. Mbacke's testimony is similar in its extent to the security guard's testimony we held sufficient in Rainwater to permit the admission of the itemized list as a business record. Further, as in Rainwater, the State's witness provided no testimony as to the store's pricing procedures. However, under Rainwater and Quincy, the electronic scan of the UPC labels on the items in Hodges' grocery cart is sufficient evidence of value, given that Safeway is a retail store that is commonly known to sell its goods for a nonnegotiable price as shown on the tag.[17] In sum, the trial court did not abuse its discretion by admitting the receipt Mbake prepared as evidence of the value of the goods stolen.

Competency Examination

Hodges argues he was denied due process by the trial court's refusal to order a competency examination after he conducted a colloquy with Hodges and reviewed Dr. Gagliardi's May 29, 2007 forensic psychological evaluation. We disagree.

[17] Hodges seems to argue that the State has the burden of introducing evidence that Safeway is a retail store commonly known to sell its goods for a nonnegotiable price. See Br. of Appellant at 20. In neither Rainwater nor Quincy did we hold that the State has the burden of proving this fact; rather, we held that this fact need only be "commonly known." Further, we do not think, as Hodges asserts in a footnote, that the fact that Safeway customers can pay a lower, yet equally nonnegotiable, price for an item by using a Safeway Club Card renders Rainwater and Quincy inapplicable.

Unless an insanity defense is raised, a competency examination is required whenever there is reason to doubt a defendant's competency.[18] "'Incompetency'

[18] RCW 10.77.060(1).

means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect."[19] The court's determination that there is a reason to doubt the defendant's competency is a threshold determination; if the trial court determines no such reason exists, then a competency examination is not required.[20] The determination of whether a competency examination should or should not be ordered rests within the trial court's discretion.[21] There are no fixed signs which invariably require a hearing.[22] Factors the court may consider in making this determination include "the 'defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.'"[23] The court should give considerable weight to an attorney's opinion regarding his or her client's competency and ability to assist the defense.[24] The trial court is not required to grant a request for a competency hearing merely because such a request has been made.[25]

One factor on which the trial court here relied was Dr. Gagliardi's May 29 evaluation.[26] In it, Dr. Gagliardi recounts some of Hodges' responses to his questions

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[19] RCW 10.77.010(14).

[20] State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

[21] State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009).

[22] State v. O'Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979).

[23] In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

[24] Lord, 117 Wn.2d at 901.

[25] Id.

[26] We disagree with Hodges that it was improper for the court to refer to the May 29 report in its determination because the report was approximately six weeks old. A psychiatric report is one of the factors a court may properly consider in determining competency and, here, Hodges' behavior in court was similar to his behavior as

and described them as "off target" and evasive.[27] Dr. Gagliardi also noted that Hodges pretended to misidentify him as his attorney and initially pretended not to know what a jury did, but later provided an adequate description. Hodges exhibited similar behavior in his responses to some of the trial court's questions. Further, as the State points out, Dr. Gagliardi noted that once he informed Hodges that he would either be found competent to proceed to trial or returned to WSH for involuntary treatment with medication, Hodges expressed a clear preference for working with his attorney on his defense and, "[f]rom that point onward in the interview his thinking was logical, coherent, and well-organized with no evidence of a thought disorder."[28] This behavior is consistent with Hodges' behavior once the court declined to continue the trial for further evaluation. As the court noted, the morning after the court denied the continuance, Hodges came to court

> all of a sudden citing Washington authority on effective assistance, and telling me you are his lawyer and wants you to be removed. It's not consistent. It is consistent with the Western State report, which is, when he wants to, he can be relatively coherent, and when he doesn't want to, he acts out.[29]

Although defense counsel told the trial court that she had concerns about whether Hodges understood what was going on in court, we conclude, given the trial court's review of Dr. Gagliardi's report and the court's observations of Hodges' demeanor and conduct, that the trial court did not abuse its discretion in declining to

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described in the report.

[27] Clerk's Papers at 106.

[28] Id. at 107.

[29] RP (July 17, 2007) at 24–25.

hold a competency hearing.

Calculation of Offender Score

Hodges' offender score was 4 for both counts of which he was convicted. The convictions used to calculate his offender score were residential burglary, first degree criminal trespass, second degree assault, and third degree assault. Hodges argues that, because first degree criminal trespass is not a felony but rather a gross misdemeanor, this conviction should not have been included in his offender score.

We review the calculation of a defendant's offender score de novo.[30] Possession of cocaine and second degree theft are nonviolent offenses.[31] Hodges is correct that, because first degree criminal trespass is a gross misdemeanor,[32] it should not be included in his offender score for purposes of sentencing him on these two nonviolent offenses.[33] However, possession of cocaine and second degree theft, the charges of which Hodges was convicted, are felonies.[34] Accordingly, these two convictions constitute "other current offenses" for purposes of Hodges' offender score and, accordingly, should have been included in the calculation of his offender score.[35] Even if Hodges' conviction of first degree criminal trespass was erroneously included in his offender score, if the two "current offense" felonies are included, as they should be,

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[30] State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

[31] See RCW 9.94A.030(30), (50).

[32] RCW 9A.52.070.

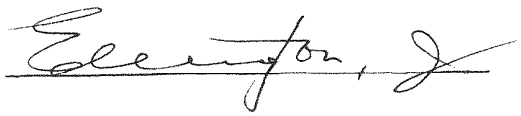
[33] RCW 9.94A.525(7) (each prior felony conviction counts as a point in the offender score of a defendant convicted of a nonviolent offense).

[34] RCW 69.50.4013(2), 9A.56.040(2).

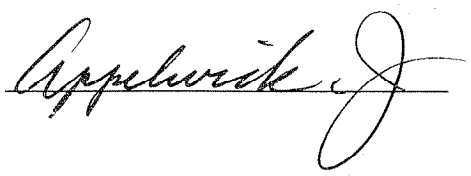
[35] RCW 9.94A.525(1), .589(1).

Hodges' offender score would be greater than 4. Accordingly, Hodges' argument that his offender score should have been 3 is without merit.[36]

Affirmed.



WE CONCUR:



[36] We note that the State does not ask that we remand this matter for resentencing.